

1 DEIRDRE DES JARDINS  
2 145 Beel Dr  
3 Santa Cruz, California 95060  
4 Telephone: (831) 423-6857  
5 Cell phone: (831) 566-6320  
6 Email: ddj@cah2oresearch.com

7 Principal, California Water Research

8  
9 **BEFORE THE**  
10 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**  
11

12 HEARING IN THE MATTER OF  
13 CALIFORNIA DEPARTMENT OF WATER  
14 RESOURCES AND UNITED STATES  
15 BUREAU OF RECLAMATION  
16 REQUEST FOR A CHANGE IN POINT OF  
17 DIVERSION FOR CALIFORNIA WATER  
18 FIX

19 RESPONSE TO THE DEPARTMENT OF  
20 WATER RESOURCES JULY 17, 2017  
21 FILING

22 Deirdre Des Jardins, Principal at California Water Research (“California Water  
23 Research”) provides this response to the California Department of Water Resources Opposition  
24 to Sacramento Valley Water Users’ Request to Keep Open Part 1 of The Hearing and Ms. Des  
25 Jardins’ Procedural Objection to Additional Information on the Project Description.

26 The Department of Water Resources (“DWR”) argued,

27 Part 1 of the Hearing does not preclude the introduction of more specific criteria upon the  
28 Petitioned Project by virtue of the Biological Opinions, the certified EIR/EIS or the final  
2081 permit. Instead, it accommodates these permitting processes in a manner that  
provides for full participation by interested parties. (p. 7)

1 Yet DWR has previously argued that comments or testimony about the CEQA/NEPA  
2 process, and the lack of completion of the process were irrelevant to the Change Petition  
3 application, and testimony on the CEQA/NEPA process was stricken on the basis of that  
4 argument.

5 The Revised Draft EIR/EIS was attached to the Change Petition, and for statutory  
6 purposes that is the specification of project operations, not the Final EIR/EIS. The further  
7 information that Petitioners provided in their Case in Chief per the Hearing ruling is the  
8 information requested by the Hearing Officers under CWC § 1701.3, and there are specific  
9 statutory requirements for failing to submit that information.

10 The California Water Code does not provide for a process of specifying proposed  
11 operations during a Hearing on a Change Petition. CWC § 1701.1 has specific mandates for what  
12 should be provided with a Change Petition, including CWC § 1701.1 (d) “Include sufficient  
13 information to demonstrate a reasonable likelihood that the proposed change will not injure any  
14 other legal user of water;” and CWC § 1701.1(e) “Contain other appropriate information and be  
15 in the form required by applicable regulations.” Title 23 CCR § 794 also has very specific  
16 requirements on what is to be provided with a Change Petition.

17 The April 25, 2016 pre-Hearing ruling did take these requirements into account in a  
18 ruling on a motion to dismiss the Petition.

19 The request to dismiss the petition is denied. Parties raised similar concerns about  
20 petition completeness during the pre-hearing conference, and this issue was addressed in  
21 our February 11, 2016 ruling. Rather than supplement the petition, the petitioners are  
22 expected to provide more information concerning project operations and potential effects  
23 on legal users of water during the petitioners’ case in chief. Although ultimately the State  
24 Water Board will decide what Delta flow criteria are appropriate in any approval of the  
25 petition, we expect the petitioners to describe, as part of their case in chief, what Delta  
26 flow criteria they believe would be appropriate. Similarly, we expect petitioners to  
describe the changes to project infrastructure and operations that are proposed as a result  
of DWR’s recent agreement with CCWD. According to the agreement, these changes will  
be identified as mitigation measures and evaluated in the WaterFix Final EIR/EIS.

1 (Agreement for Mitigation of Impacts to Contra Costa Water District from Construction  
2 and Operation of Bay Delta Conservation Plan/California WaterFix, Mar. 29, 2016, pp. 5,  
3 23, ¶¶ 1.1.3, 3.11.) (p. 3, underlining added.)

4 Yet Petitioners did not describe what Delta flow criteria they believe would be  
5 appropriate in their case in chief, and the Department of Water Resources declined to answer a  
6 letter requesting that information on May 3, 2017. So the Part 1 Case in Chief, Rebuttal, and  
7 Surrebuttal phases have concluded without specifying this information, and also without the  
8 information in the Final Biological Opinion. Allowing the entirety of Part 1 of the hearing to  
9 proceed without this information has been a very costly burden, and is ultimately prejudicial.

10 It is unclear what remedies are available to protestants. The March 15, 2017 ruling stated  
11 that the State Water Board has a general rule that motions to dismiss are not permitted in  
12 adjudicative proceedings before the State Water Board, and that any motions to dismiss at the  
13 end of Part 1 would be summarily denied.

#### 14 **Motions to Dismiss**

15 [...]

16 We decline to consider motions to dismiss at the conclusion of Part 1 of the hearing. As  
17 a general rule, motions to dismiss, akin to a motion for judgment in a civil trial, are not  
18 permitted in adjudicative proceedings before the State Water Board. (See O'Mara v.  
19 California State Bd. of Pharmacy (1966) 246 Cal.App.2d 8, 12 [section 631.8 of the  
20 California Code of Civil Procedure, which provides for motions for judgment in civil  
21 court trials, has no application to administrative hearings].) In the order dismissing the  
22 enforcement proceedings against BBID and WSID, the State Water Board expressly  
23 stated that it does not generally allow parties to move for judgment during the course of  
24 an evidentiary hearing, and discouraged parties in future proceedings from attempting to  
25 do so. (Order WR 2016-0015, p. 12.) The issues involved in this proceeding are  
26 fundamentally different from the issues involved in the enforcement proceedings against  
27 BBID and WSID. Accordingly, we decline to depart from our usual practice of reaching  
28 a decision on the merits based on the entire record after all of the parties have presented  
all of their evidence. Accordingly, any motions to dismiss filed at the conclusion of Part  
1 of the hearing will be summarily denied. (See Erika K. v. Brett D. (2008) 161  
Cal.App.4th 1259, 1271 [trial court has absolute discretion to deny section 631.8 motion  
for judgment regardless of the state of the evidence].) (underlining added.)

1  
2 On researching the statutes and Board precedents underlying the March 15, 2017 ruling,  
3 the ruling does appear to be discretionary. While Cal. Code Civ. Proc. § 631.8 does not apply to  
4 administrative hearings, nothing prevents the Board from allowing motions to dismiss or motions  
5 for summary judgement in Board proceedings.

6 The California Air Resources Board has regulations allowing for motions to dismiss and  
7 motions for summary judgement (CCR § 60075.25.) Therefore the SWRCB rule disallowing  
8 motions to dismiss is discretionary. If it is a rule of general application, APA rules would  
9 normally require the rule to be adopted as a regulation. (cite.) The exception to this is if a  
10 precedential decision has been adopted.

11 Searching for other decisions on motions to dismiss on the SWRCB website, I came  
12 across both a Water Right Order and a Water Right Decision which supported motions to dismiss  
13 on similar circumstances of incomplete information, which are cited in Attachment A. I could  
14 not find a precedential decision which barred motions to dismiss or motions for summary  
15 judgement in Board proceedings.

16  
17 Respectfully submitted,

18  
19 

20 Deirdre Des Jardins  
21 Principal, California Water Research

22  
23 Executed on this 19<sup>th</sup> day of July, 2017.  
24  
25

1  
2 1. WRO 2006-0001.<sup>1</sup>

3 In response in part to a Supplemental Motion for Summary Judgement by the Morongo  
4 Band of Mission Indians, the Board stated:

5 After consideration of the testimony and written evidence presented at the hearing  
6 and written closing statements, the State Water Board has determined that the  
7 record does not contain sufficient evidence to support a decision to revoke  
8 License 659 in light of the California Court of Appeal's decision in Millview  
9 County Water District v. State Water Resources Control Board (2014) 229  
10 Cal.App.4th 879. (p. 1)

11 The decision further stated:

12 2.4 Millview Decision and Supplemental and Renewed Motion to Dismiss  
13 On September 11, 2014, the California Court of Appeal, First Appellate District  
14 issued a decision in Millview County Water District v. State Water Resources  
15 Control Board (2014) 229 Cal.App.4th 879. The court held that the forfeiture of a  
16 pre-1914 water right for failure to use water under the right requires the assertion  
17 of a conflicting claim to use the water at issue during the period of non-use. On  
18 December 22, 2014, the Morongo Band filed a supplemental and renewed motion  
19 to dismiss the proposed revocation of License 659. In this motion, the Morongo  
20 Band argued that there is no competing claim for the water subject to License 659  
21 and noted the lack of active protests to the Morongo Band's pending petition for  
22 change of License 659. (p. 7)

23 2. Decision 692<sup>2</sup>

24 In view of the motion to dismiss Application 10805 on grounds that are well supported  
25 by the information at hand, that motion should be sustained and the application denied.  
26 (p. 38.)

---

27 <sup>1</sup> Water Right Order 2006-0001. Available at  
28 [http://www.waterboards.ca.gov/waterrights/board\\_decisions/adopted\\_orders/orders/2016/wro2016\\_0001.pdf](http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2016/wro2016_0001.pdf)

<sup>2</sup> Water Right Decision 692. Available at  
[http://www.waterboards.ca.gov/waterrights/board\\_decisions/adopted\\_orders/decisions/d0650\\_d0699/wrd692.pdf](http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d0650_d0699/wrd692.pdf)

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

**Department of Water Resources and U.S. Bureau of Reclamation  
(Petitioners)**

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

**RESPONSE TO THE DEPARTMENT OF WATER RESOURCES'  
JULY 17, 2017 FILING**

to be served by Electronic Mail (email) upon the parties listed in the Current Service List for the California Water Fix Petition Hearing, dated July 3, 2017, posted by the State Water Resources Control Board at

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/service\\_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)

*Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.*

I certify that the foregoing is true and correct and that this document was executed on July 19, 2017.

Signature:

DDA

Name: Deirdre Des Jardins

Title: Principal, California Water Research

Party/Affiliation:

Deirdre Des Jardins

Address:

145 Beel Dr

Santa Cruz, California 95060

-6-